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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXIM GRAIN TRADE B.V., Plaintiff, - against - J.K. INTERNATIONAL PTY LTD., Defendant.	08 CIV 6989 (WHP)

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE ORDER OF MARITIME ATTACHMENT AND GARNISHMENT OBTAINED UNDER SUPPLEMENTAL RULE B OF THE SUPPLEMENTAL RULES OF F. R. CIV. P. FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

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TABLE OF CONTENTS

900200.00001/6661568v.1

TABLE OF AUTHORITIES

FEDERAL CASES

INTRODUCTION

Defendant J.K. INTERNATIONAL PTY LTD ("JKI") respectfully submits this memorandum of law in support of its emergency motion pursuant to Supplemental Rule E and F. R. Civ. P. Rule 12(b)(1) to dismiss the complaint and to vacate an order of maritime attachment and garnishment dated August 8, 2008 ("PMAG") obtained under Supplemental Rule B of the Supplemental Rules of F. R. Civ. P. for Certain Admiralty And Maritime Claims ("Supplemental Rules") obtained by Plaintiff Exim Grain Trade B.V. ("Exim") pursuant to which it has attached $1,508,267.70.

Exim's claim is based on a FOB sales contract to sell wheat, not a charter party to transport it. JKI respectfully submits that the Court lacks admiralty jurisdiction, as explained below. JKI has not moved by order to show cause for an emergency hearing to free its assets because Local Rule E.1, implementing Supplemental Rule E(4)(f)'s "prompt hearing" requirement, specifically provides for a hearing "within three (3) court days, unless otherwise ordered." JKI respectfully requests such an expedited hearing, especially given Exim's counsel's familiarity with this challenge to jurisdiction; an issue that it apparently did not raise with the Court in its ex parte application.

THE BASIC FACTS

A. THE SALES CONTRACT

Exhibit 1 to the Complaint dated August 5, 2008 ("Complaint") is a document entitled "CONTRACT 6025/06" dated October 11, 2006 between Exim, defined as "Seller" and JKI as "Buyer" (the "Sales Contract"). Under the Sales Contract JKI

contracted to purchase and Exim contracted to sell "Russian milling wheat, crop 2006" in a quantity of 50,000 metric tons, "5 percent more or less" at JKI's option.

Delivery of the grain was to be:

> FOB stowed and trimmed
> Novorossiysk

The definition of "FOB" at the named port of shipment, as set out in Incoterms 2000[1] is:

> "Free on Board" means that the seller delivers when the goods pass the ship's rail at the named port of shipment. This means that the buyer has to bear all costs and risks of loss of or damage to the goods from that point. The FOB term requires the seller to clear the goods for export. This term can be used only for sea or inland waterway transport. If the parties do not intend to deliver the goods across the ship's rail, the FCA term should be used.

B. THE NATURE OF THE DISPUTE UNDER THE SALES CONTRACT

Exhibit 2 to the Sales Contract is Exim's claim submission to the GAFTA tribunal (the "GAFTA Claim"). It should be noted that a GAFTA arbitration, that is under the arbitration rules of The Grain And Feed Trade Association, is not a maritime arbitration. Exim claims that JKI loaded only 40,280 metric tons (Ex. 2, ¶ 11) and made "no efforts to arrange taking of the balance of 12,220.00 MT of the goods" (Id., ¶ 12). Accordingly:

> . . . Sellers through their lawyers declared the Buyers in default for the unfulfilled quantity with notification on further claim for damages to be submitted …

Ex. 2, ¶ 13.

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[1] Available at www.iccwbo.org/incoterms.

Exim's principal claims are the difference in the Sales Contract price and its re-sell price (Id. ¶ 27) and for storage services (Id. ¶ 28).

ARGUMENT

POINT I

PLAINTIFF CARRIES THE BURDEN TO SHOW WHY THE ATTACHMENTS SHOULD BE MAINTAINED; OTHERWISE THE COURT IS REQUIRED TO VACATE THE ATTACHMENTS

An order of maritime attachment and garnishment pursuant to Rule B is typically issued upon a minimal prima facie showing, usually made ex parte. See, e.g., Seaplus Line Co. v. Bulkhandling Handymax, 409 F. Supp.2d 316 (S.D.N.Y. 2005). Once property has been restrained:

> Any person claiming an interest in it shall be entitled to a prompt hearing at which *the plaintiff shall* ***be required to show why the arrest or attachment should not be vacated*** or other relief granted consistent with these rules.

Rule E(4)(f) (emphasis supplied).

The Second Circuit has found that Rule E(4)(f) is clear and the burden is on the plaintiff to show the attachment "was properly ordered and complied with the requirements of Rules B and E." Aqua Stoli Shipping Ltd. v Gardner Smith Pty. Ltd., 460 F.3d 434, 445 n.5 (2d Cir. 2006).[2] Rule E does not specify what form the post-attachment hearing must follow and the nature and scope of the hearing depends entirely

[2] To the extent the attachment is to be vacated on an equitable ground, however, the burden is on the defendant to establish any equitable grounds for vacatur. Id.

upon the issues in controversy. Salazar v. THE ATLANTIC SUN, 881 F.2d 73, 79 (3d Cir. 1989).

"The absence of maritime jurisdiction would prove fatal to plaintiff's attachment." Maritima Petroleo e Engenharia Ltda v. Ocean Rig IA, 78 F. Supp. 2d 162, 166 (S.D.N.Y. 1999). See also, Winter Storm Shipping Ltd. v. TPI, 310 F.3d 263, 268 (2d Cir. 2002) (which held that in order to support the issuance of a maritime attachment, "the plaintiff's claim must be one which will support a finding of admiralty jurisdiction under 28 U.S.C. § 1333") (citation omitted).

Accordingly, the burden is now on Plaintiff to establish the Court's admiralty jurisdiction to sustain the PMAG.

POINT II

NEITHER THE SALES CONTRACT NOR THE DISPUTES UNDER IT GIVE RISE TO ADMIRALTY JURISDICTION

A. THE APPLICABLE STANDARD FOR DETERMINING WHETHER A CLAIM IS MARITIME

As summarized by Judge Preska in C. Transport Panamax, Ltd. V. Kremikotzi Trade E.O.O.D [etc.], (S.D.N.Y. June 19, 2008) 2008 U.S. Dist Lexis 48688*5:

> To determine whether a claim sounds in maritime, "courts should look to the subject matter of the [relevant] contract and determine whether the services performed under the contract are maritime in nature." *Exxon Corp. V. Central Gulf Lines, Inc.*, 500 U.S. 603, 612, 111 S. Ct. 2071, 114 L. Ed. 2d 649 (1991). This inquiry "depends upon . . . the nature and character of the contract, and the true criterion is whether it has reference to maritime service or maritime transactions." *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 24, 125

> S. Ct. 3385, 160 L. Ed. 2d 283 (2004) (quotation marks omitted).

As stated in Exxon, 500 U.S. at 608:

> "The fundamental interest giving rise to maritime jurisdiction is 'the protection of maritime commerce.'" *quoting Sisson v. Ruby, 497 U.S. 358, 367, 110 S. Ct. 2892, 111 L. Ed. 2d 292 (1990); quoting Foremost Ins. Co. v. Richardson, 457 U.S. 668, 674, 102 S. Ct. 2654, 73 L. Ed. 2d 300 (1982).*

B. THE TEST AS STATED IN THE SECOND CIRCUIT

In F.H. Bertling Holding KG v. Ranhill Engineers & Construction SDN, BHD, 2008 U.S. Dist. LEXIS 52085 (S.D.N.Y. July 9, 2008) Judge Scheindlin carefully examined the applicable law to a motion to vacate for lack of maritime jurisdiction.

1. Threshold Inquiry

Citing Folksamerica Reinsurance Co. v. Clean Water of N.Y., Inc., 413 F.3d 307, 312 (2d Cir. 2005), Judge Scheindlin set out the Second Circuit's threshold inquiry, based on the assumption that it survived the Supreme Court's decision in Kirby, supra, as follows:

> The threshold inquiry examines the subject matter of a dispute, as opposed to the underlying contract, to determine if "an issue related to maritime interests has been raised." A dispute will not give rise to maritime jurisdiction if "the subject matter of the dispute is so attenuated from the business of maritime commerce that it does not implicate the concerns underlying admiralty and maritime jurisdiction."
>
> * * *
>
> Traditionally, only "contracts, claims, and services *purely* maritime" were covered by federal maritime jurisdiction. Two exceptions to this rule allow maritime jurisdiction over contracts that combine both maritime and non-maritime elements: *first*, if the maritime elements of a contract are the

> principal or primary objective of the contract, and second, if "the claim arises from a breach of maritime obligations that are severable from the non-maritime obligations of the contract."

Id. at *13-14.

In applying the law to the logistics agreement ("Agreement") at issue the Court held that "the nature of the dispute is sufficiently connected to maritime commerce to pass the threshold" set by Folksamerica. Id. at *18. Next the Court held that because the Agreement "contemplates land-based obligations as well as ocean-based ones, it is not a purely maritime contract" so that maritime jurisdiction would only lie "under the principal purpose or severability exception." Id. at *19. Although the Agreement mentioned ocean shipping ("door to door freight forwarding") the Agreement did not name, inter alia, ports of origin or destination, shipping dates or rates and specifically reserved the buyer's shipping rights so that Bertling, the Rule B plaintiff, "might not be in a position to arrange or charge for any shipping, oceanic or otherwise." Id. at *21. The Court concluded:

> Because the Agreement specifically contemplates a situation in which Bertling is not involved in ocean shipping in any way, it does not have maritime commerce as its principal purpose. . . . Its principal purpose is not maritime commerce, but rather logistical support for the specified construction projects.
>
> The Logistics Agreement does not fit within the severability exception because it creates no maritime obligations that might be severed from other land-based obligations. Further, because the Agreement lists no allotments or percentages of ocean shipping that Bertling is bound to perform, nor any separate shipping rates or charges, any maritime obligations

> that the Agreement may have created cannot be clearly separated from the land-based obligations.

Id. at * 21.

C. THE SALES CONTRACT IS NOT A MARITIME CONTRACT

1. The Complaint Does Not Pass The Threshold

Despite artful pleading in the Complaint to give it a "salty" flavor, the "subject matter of the dispute" has no connection to maritime commerce. As set forth in Exim's GAFTA Claim, the subject matter of the dispute is JKI's alleged wrongful failure to take "the balance of 12,220.00 mt of the Goods." Ex. 2, ¶ 12. Exim's claims are for the price difference and land storage.

Moreover, given that the sales' terms were "FOB," Exim (unlike Bertling) was never "in a position to arrange or charge for any shipping, oceanic or otherwise."

2. The Sales Contract Does Not Fit Within Either Of The Two Exceptions

a. The "Principal Or Primary Objective" Of The Sales Contract Was The Sale And Purchase Of Russian Grain

The Sales Contract's primary objective was the sale of goods and not their transportation by sea. The notion that a sales contract becomes "maritime" simply because there is a sale of goods that are to be transported by sea has been consistently rejected. In Lucky-Goldstar Int'l (America) Inc. v. Phibro Energy International, Ltd., 958 F.2d 58, 59 (5th Cir. 1992) the Court stated that it was "beyond civil" that "a principal purpose of the contract was the land-based sale of over a thousand metric tons of toluene." It continued:

> "[i]t is well-established that such a sale of goods by itself would not be "maritime" merely because the seller agrees to

> ship the goods by sea to the buyer.); Armour & Co. v. Fort Morgan Steamship Co., 270 U.S. 253, 259, 1926 AMC 327, 331 (1926) ("The original contract to purchase, assemble, and sell the cattle, to charter vessels and therein transport the cattle to Jacksonville, and the agreement of compromise, are not maritime contracts"); Laredo Offshore Constructors, Inc. v. Hunt Oil Co., 654 F.2d 1223, 1231-32 (5th Cir. 1985) ("It is fundamental that the mere inclusion of maritime obligations in a mixed contract does not, without more, bring non-maritime obligations within the pale of admiralty law"); Luckenbach S.S. Co. v. Gano Moore Co., 298 Fed. 343, 344, (2d Cir. 1923) (L. Hand, J.), rev'd in part on other grounds, 298 Fed. 344 (2d Cir. 1924). ("Nor is it possible to treat a contract of sale as maritime even though its performance involves the carriage of goods on the seas to the place of delivery. . . . In such matters, the whole contract must be maritime in its character, and, when the performance is partly maritime and partly terrene, a court of admiralty will not assume jurisdiction over it, unless the nonmaritime features be inconsiderable.")

958 F.2d at 59.

See also French Republic v. Fahey, 278 F.2d 947, 948 (D.C. Md. 1922) ("The circumstance that the buyer wanted the grain transported by water did not alter the essential nature of the agreement.")

The undisputed principal purpose of the Sales Contract was the sale and purchase of wheat. The Sales Contract is not a maritime contract within the meaning of Rule B.

The issue of whether the breach of a sales contract would support a Rule B attachment has been recently addressed by several Judges sitting within the Southern District of New York.

In Aston Agro-Industrial AG v. Star Grain Ltd., 2006 U.S. Dist. LEXIS 91636 (S.D.N.Y.)(Daniels, J.), the Court considered two contracts for the sale of Russian wheat that "specified that delivery would be made by ship" and that provided "clauses relating

to the conditions under which the shipment and unloading of the wheat should occur." Aston, as seller entered into separate charter parties for two vessels to carry and deliver the wheat to Star Grain in Egypt. The wheat was damaged and Star Grain demanded cash payment for the damage. The vessels were delayed for two months until the ship owners paid Star Grain. Star Grain refused to pay Aston for the "demurrage" for the vessels' delay. In the ensuing GAFTA arbitration the tribunal found Star Grain liable for demurrage under the sales contracts. Aston filed its Rule B action to satisfy the GAFTA award. Judge Daniels held:

> In this case, the contracts are not maritime contracts because their primary objective was not the transportation of goods by sea. Instead, **their primary objective was, undoubtably (sic.), the sale of wheat**. That the wheat was transported on a ship does not make the contracts maritime contracts any more than it would make them aviation contracts had the wheat been shipping via airplane. Nor were they contracts between a seller and a shipper. In fact, Aston entered into two separate charter parties to accomplish the shipment of the wheat, and it was the primary maritime objective of those contracts to transport the wheat by sea. Thus, the charter parties between the seller and the shipper, like the bills of lading in Kirby, are maritime contracts, see, e.g. Asoma Corp. v. SK Shipping Co., 467 F.3d 817, 2006 WL 3017982 *5 (2d Cir. 2006) ("Charter parties and bills of lading are interpreted using the ordinary principles of maritime contract law."). The contracts for the sale of wheat are not.

Id. at *9-10. (emphasis added)

Judge Daniels continued in respect of the exception, claimed by Aston:

> Here, invoking the first exception, Aston contends that maritime jurisdiction exists because the particular claims at issue involve only the maritime portions of the contracts. The contracts create no maritime obligations on Star Grain, however, let alone any maritime obligations that are severable

900200.00001/6661568v.1

> from the non-maritime obligations. Rather, Star Grain's only obligations under the contracts were to pay the agreed-upon price pursuant to the stipulated payment terms, and to begin discharging the wheat when the ships arrived in port even if the ships arrived before the bills of lading were received. There is nothing uniquely maritime about these obligations necessitating "a neutral federal forum and uniform body of law to adjudicate rights and liabilities as they relate[] to the trafficking of sea-faring vessels." Atlantic Mut. Ins. Co. v. Balfour Maclaine Int'l Ltd., 968 F.2d 196, 200 (2d Cir. 1992) . . . . Rather, all that was required in adjudicating the underlying claims here was the straight-forward interpretation of contracts for the sale of goods.

Id. at *13.

In a decision also interpreting a similar contract, Judge Lynch found no maritime jurisdiction over a claim for the non-delivery of iron ore shipped from India to China in Shanghai Sinom Import & Export v. Exfin (India), 2006 AMC 2950, 2951-2952 (S.D.N.Y. 2006):

> Suffice to say, that plaintiff has sued because it did not receive the goods, or all of them, in a timely manner, and it seeks various items of damages for such nondelivery.
>
> On this record, both common sense and long-established case law suggest that this is a nonmaritime dispute between a purchaser and seller over the alleged failure to deliver purchased goods. I note that the dispute has no connection to the United States whatsoever, and there is apparently no basis for in personam jurisdiction over the defendant in this court or for subject matter jurisdiction in the federal courts on any nonadmiralty basis. This case is only here because of the liberal provisions for attachment and in rem jurisdiction in admiralty cases.
>
> * * *
>
> What we have here is a contract of the sort perfectly familiar long before the advent of container ships and integrated transportation systems. The purchase of goods by a buyer in

> one country from a seller in another, with a proviso that the goods are to be sent by sea, and with some incidental provisions bearing on the nature of that shipment, the alleged breach here was a breach wholly of the sale of goods provisions of the contract, not of its incidental maritime aspects, or indeed, of any transportation aspect at all. There is thus no basis in this case for maritime jurisdiction.
>
> (emphasis added)

Recently, Judge Crotty also vacated an order of attachment on the basis that the underlying sales contract did not give rise to a maritime claim. Tangshan Shiajichenhui Iron & Steel v. Lords Polymer P VT Ltd., et al., 08-Civ-3576, Docket Entry # 15. Appendix A.

Just like the contracts involved in Aston, Shanghai Sinom and Tangshan, there is nothing maritime about the claims asserted by the Plaintiff in the GAFTA arbitration. The claim is nothing more than an alleged breach of a contract to purchase Russian Milling Wheat on FOB terms . If the CIF term contract in Aston is not maritime, then the FOB Sales Contract here cannot be, either.

D. NOBLE RESOURCES V. YUGTRANZITSERVIS ET AL., 08 CV 3876(LAP)

Judge Preska's ruling at oral argument on July 23, 2008 (Appendix B hereto) involved a similar challenge to admiralty jurisdiction in respect of a Rule B complaint filed by Exim's counsel. The underlying contract was for the sale and purchase of 25,000 metric tons of Russian milling wheat and a guarantee agreement in respect of that sales contract. As alleged by Noble (in its brief dated July 22, 2008, page 5):

> More importantly, the breaches that are alleged by Noble in its Rule B application, relate specifically to the maritime

> portions of the contract. Noble is seeking security for losses suffered as a result of YTS's failure to load the Vessel after its nomination was approved. Additional damages were sought for wasted vessel expense including bunkering costs, port and survey costs and hire payments.

Judge Preska, in finding that the sales contract was maritime giving rise to the Court's admiralty jurisdiction, held:

> Here, the contract itself makes clear that maritime transportation was integral to the agreement. For example, the contract provided that Plaintiff Noble would purchase a cargo from YTS and the contract set out in great detail the conditions for transportation and delivery.
>
> *   *   *
>
> In addition, the dispute between the parties also touches upon the maritime commerce. As set out in plaintiff's claim submissions in the arbitration, and perhaps more importantly as reflected in the award, the dispute centered on two issues. First, the default by YTS in failing to provide a berth for the vessel after she had tendered her notice of readiness and refusal to load the vessel constituting a default under the contract. And, secondly, a request for wasted vessel costs, that is, the costs incurred by the vessel following tendering of her notice of readiness.
>
> *   *   *
>
> For all those reasons, I find that the contract and dispute at issue fall within the Court's maritime jurisdiction.

Appendix B, p. 2-4.

Judge Preska's ruling is the subject of a pending motion for reconsideration that has yet to be fully briefed. The decision is contrary to Judge Daniel's ruling on a similar sales contract in Aston where the claim was for vessel demurrage. Maritime transport is not "integral" when the Seller expressly contracts for FOB terms not to have anything to

do with the transportation of the cargo. Nor are the claims in the GAFTA arbitration anything to do with a vessel but for failure to "arrange taking of the balance" of the cargo. Complaint, Ex. 2, ¶ 12.

Noble is contrary to a body of authority and distinguishable on its facts.

CONCLUSION

Defendant respectfully requests that the Court order that the PMAG be vacated and the Complaint dismissed for lack of admiralty jurisdiction and for such other relief as is fair and equitable and as requested herein.

Date: New York, New York
August 14, 2008

Respectfully submitted,

BLANK ROME LLP

By: Jeremy Harwood

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Attorneys for Defendant

APPENDIX A

Crotty

USDS SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #: ________
DATE FILED: MAY 20 2008

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

--- X

TANGSHAN SHIAJICHENHUI IRON AND STEEL PRODUCTS CO. LTD.,

Plaintiff,

- against -

LORDS POLYMER (I) PVT. LTD.; BLUE FLEET MANAGEMENT COMPANY LTD.; BLUE FLEET CHARTERING S.A.; and BELINDA BLUE OCEAN INC.,

Defendants.

--- X

08 Civ. 3576 (PAC)

ORDER and JUDGMENT

WHEREAS, defendant Lords Polymer (I) Pvt., Ltd., brought by Order to Show Cause dated May 13, 2008, a motion seeking an order vacating the process of maritime attachment and garnishment (hereinafter "PMAG") against it, in ~~favour~~ Favor of plaintiff Tangshan Shiajichenhui Iron and Steel Products Co., Ltd.; and

WHEREAS, the parties had an opportunity to fully brief the issues raised in the motion; and

WHEREAS, the Court heard oral argument of the motion on May 19, 2008; and

WHEREAS, following oral argument and after consideration of the papers filed in relation to the motion and upon all prior pleadings filed in the matter, the Court ruled that the dispute between plaintiff Tangshan Shiajichenhui Iron and Steel Products Co., Ltd., and defendant Lords Polymer (I) Pvt., Ltd., was not cognizable under the Court's admiralty and maritime jurisdiction.

NOW, THEREFORE, it is hereby:

ORDERED that the PMAG issued pursuant to the Court's Order dated April 15, 2008, is vacated as to defendant Lords Polymer (I) Pvt., Ltd.; and it is further

ORDERED that any and all goods, chattels, credits, letters of credit, bills of lading, debts, effects and monies, funds, wire transfers, accounts, electronic fund transfers, freights, sub-freights, charter hire, sub-charter hire, or any other tangible or intangible property being held or restrained by or on account of the PMAG are to be released forthwith and wired in accordance with their original instructions or in accordance with instructions received from Lords Polymer (I) Pvt., Ltd., as conveyed by its counsel; and it is further

ORDERED that this matter be discontinued with prejudice and without costs as to Lords Polymer (I) Pvt., Ltd.; and it is further

ORDERED that this Order shall have no effect upon any other defendant not specifically named in this Order and Judgment.

Dated: New York, New York
May 20, 2008

SO ORDERED:

Paul A. Crotty

U.S.D.J. **Date**

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
------------------------------x

NOBLE RESOURCES,

Plaintiff,

v. 08 CV 3876(LAP)

YUGTRANZITSERVIS and
SILVERSTONE,

Defendants.

------------------------------x

New York, N.Y.
July 23, 2008
9:45 a.m.

Before:

HON. LORETTA A. PRESKA,

District Judge

APPEARANCES

TISDALE LAW OFFICES, LLC
Attorneys for Plaintiff
BY: CLAURISSE OROZCO

CHALOS & CO.
Attorneys for Defendants
BY: GEORGE M. CHALOS

(Case called; in open court)

THE COURT: Counsel have very graciously agreed to prepare their papers quickly so that the hearing required to be conducted quickly on a motion to vacate a maritime attachment could take place promptly. I am grateful to counsel for doing that.

Defendant argues first that the contract at issue is not subject to maritime jurisdiction. We all agree to the law which is that the threshold inquiry examines the subject matter of dispute as opposed to the underlying contract. To determine if an issue related to maritime interests has been raised, an issue will not give rise to maritime jurisdiction if the subject matter of the dispute is so attenuated from the

maritime jurisdiction. As the Court has set out recently in C Transport Panamax, Ltd. v. Kremikovtzi Trade, et al., 07 CR 893 (June 19, 2008 S.D.N.Y.) courts in this circuit and elsewhere have long held that an agreement to act as a surety on a maritime contract is not maritime in nature. They have recognized that the same is not true of an agreement to

guarantee the performance of a maritime contract.

See e.g. Compagnie Francaise, DE Navigational Avapeur v. Bonnase, 19 F.2d 777, 779 (2d Cir. 1927) (L. Hand, J).

Here the guarantee by Silverstone specifically states "The guarantor (Silverstone) irrevocably and unconditionally, A, as principal obligor guarantees to the Buyers the prompt performance by (YTS) of all its obligations under the Contract...." Accordingly, the guarantee at issue here based on longstanding Second Circuit law falls within the meaning of maritime contracts.

Finally, with respect to defendant's argument that the matter is not ripe, the arbitral award has ordered that the payment be made and it has not yet been paid. Accordingly, the matter is ripe with respect to the guarantor. In addition, it is most frequently the case that Rule B attachments are used to provide security for arbitral awards and that has been the use here. Accordingly, defendants' motion to vacate the attachment is denied.

THE COURT: Is there anything else today?

MR. CHALOS: Yes, your Honor, two points if I may.

THE COURT: Sir.

MR. CHALOS: We thank the Court for hearing us on an expedited basis. We would first off like to make an application to the Court to reduce the amount of security. On page 14 of the award, the panel clearly sets forth that the

plaintiff was awarded $3,362,400 and no more as the words of the panel. Here the amount of the order attachment is almost double that. It is significantly more.

THE COURT: What is the story with the interest, Mr. Chalos?

MR. CHALOS: According to the panel, it is 7.5 percent beginning August 16, 2007. That is only one year's worth of interest. Surely this can be resolved in the next, I would assume, six months or so with the upcoming appellate deadlines.

THE COURT: Has anyone done the calculation of the interest?

MS. OROZCO: I have, your Honor. But I would just like to speak on that point. The panel awards the amount less than we had sought in our application, but it also awards interest 7.5 percent from the date of the default until it is paid and it also awards costs of arbitrator, not legal costs.

We have attached to date as outlined in my declaration $4 million. It is paragraph 34 of my declaration at page 6. We have not calculated the interest out for a year. What we have done is calculated it out for three years, which is normally what we undertake in anticipating appeals and that sort of thing. If we allow for three years of interest, security for three years of interest, plus the costs of the Gafta arbitration, the security that we would be entitled to

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would be $4,225,000.

So we are at this time undersecured by 200,000. However, if the Court wants us to reevaluate the interest, we would be willing to do so and then release the funds accordingly if that was a proper analysis.

THE COURT: Counsel.

MR. CHALOS: Those calculations are flawed. Those calculations are based on the principal claim of 3.9 million. That is not what the panel awarded. 7.5 percent on the $3.3 million award is about, 21 to $210,000.

MS. OROZCO: I actually calculated the three-year interest on the amount awarded by the arbitrators, which was $3,362,400. And the interest from August 15th, 2007 through August 15th, 2010 is $840,000.

MR. CHALOS: I submit through 2010 is a bit long. I can certainly understand maybe two years, but not three.

Also, seeing as they are already secured from the guarantor's EFTs, I renew my application and dismiss the matter against YTS. They are secured or they are not secured. They have it already attached. There is no in rem quasi jurisdiction over the party whose funds who haven't been attached.

THE COURT: I don't hear counsel going out and seeking further attachments here.

MR. CHALOS: But they would, though. That is the point if they sought to move money. In fact, in the papers

that counsel submitted last night, they said exactly that they would do that. If they wound up -- U.S. dollar transfers on behalf of Yugtranszitservis came through New York, they would catch that and release monies belonging to the guarantor.

THE COURT: What do you say to that, counsel?

MS. OROZCO: Was that was a statement that we made. That statement as made with respect to the application of the New York CPLR in that case, which we didn't address and we say we are not applied. We actually have stopped serving the writ of attachment in this case and we are no longing serving on any of the defendants.

THE COURT: First, I decline to reduce the amount.

Second, obviously counsel knows that plaintiff may not be oversecured. If, Mr. Chalos, you find that plaintiff is attaching more than the four million two number -- is that the total number? Please remind me.

MS. OROZCO: Yes. The total number is comprised of $3,362,400 of principal pursuant to the arbitration award issued on July 4th, 2008, with the rate of interest calculated at 7.5 percent which is also the rate awarded for three years from August 15th, 2007 through August 15th, 2010. The interest on that amount is $840,501.

In addition, the arbitration award also allowed costs, Gafta costs, to the plaintiff and the Gafta costs incurred were 23,000 U.S. dollars. So the total security we would be

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entitled to or we would be seeking is $4,225,901.

THE COURT: To the extent, Mr. Chalos, counsel attaches more than that, you let me know.

MR. CHALOS: Thank you, your Honor.

Finally, your Honor, we would like to ask the Court to certify this for immediate appeal to the Second Circuit.

THE COURT: I will take a letter on that.

How is this a complex or novel issue?

MR. CHALOS: Well, it is a novel issue in the sense that the Court has for the first time found a Gafta contract to be within the meaning of a maritime contract and a maritime claim under Rule B. It stands starkly in contrast to Judge Daniels' decision as to Aston Agro as well as Judge Sullivan, I am not sure about that, in the Tan Shan case. These exact arguments were presented there with a 180-degree different result and I do believe that if we can bring this to a head Second Circuit level promptly that would help provide some clarity on these types of issues.

THE COURT: The law is not in doubt. It is the application, right?

MR. CHALOS: Well, I think the law is in doubt in a sense that our position is that the Court needs to look to the primarily objective of the contract. Our argument has been that the primary objective of the contract is one of sale and purchase.

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THE COURT: I didn't see any of the Second Circuit cases talking about the primary objective of the contract.

MR. CHALOS: Well, I think we set out the argument based on the precedent of Judge Daniels' decision, which can be found for the Court's reference on page 3 of the Aston Agro decision where he writes, In this case the contracts are not maritime contracts because they are primary objective was not the transportation of goods by sea. Instead, their primary objective was undoubtedly the sale of wheat. That the wheat was transported on a ship does not make the contracts maritime contracts anymore than it would make them aviation contracts had the wheat been shipped via airplane. Nor would the contracts between a seller and shipper -- that is true here. the judge in that matter goes on to write, Nor can maritime jurisdiction be exercised under an exception to the general rule that maritime jurisdiction "Arises only when the subject matter of the contract is purely or wholly maritime in nature. Under the first exception, federal court can exercise --

THE COURT: Counsel, do you want this taken down? If you do, you better read so the court reporter can take it down.

MR. CHALOS: The Court has it before it.

THE COURT: So you don't need to read it.

MS. OROZCO: May I respond?

THE COURT: Yes, ma'am.

MS. OROZCO: The key to the quotes by defendant from

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the Ashon Agro case is the first line where it says, "In this case." and further or in the quote Judge Daniels says that based on the facts of that particular case they are not within the maritime jurisdiction.

I would just like to point out that the Exxon case,

500 U.S. 603, 612 reminds us -- this is the U.S. Supreme Court -- reminds us that courts are required to look to the subject matter of the relevant contract. And in this case the relevant contract, the Noble YTS contract, provides maritime jurisdiction.

MR. CHALOS: Your Honor, this is the shifting sands that I have been arguing again. The Court is required to look to the nature of the contract, not the dispute. Twenty minutes ago counsel was arguing the Court needs to look to the dispute and I rejected that. The contract is a sale and purchase contract, not a maritime contract. It is not maritime contract with third parties. We had nothing do with it. My clients had nothing to do with it. That is the dispute here. If you look to the nature and substance of the contract, we are selling and they are buying. Full stop. It is the sale and purchase contract.

In fact, your Honor, that was precisely what was addressed by Judge Daniels. He writes here invoking the first exception, Aston contends that maritime jurisdiction exists because the particular claims at issue involve only the

maritime portions of the contracts, and it was rejected, which is precisely the argument presented by plaintiff. Our opposition is precisely the argument adopted by Judge Daniels.

THE COURT: The Court denies the request for certification under 28, U.S.C., Section 1292(b). The controlling law is not at all at issue in this case. Everyone agrees on the cases that should be looked to for guidance. The only dispute is the application of those cases to the facts of this case as opposed to the facts of other cases. Accordingly certification for immediate appeal is denied.

Anything else, counsel?

MR. CHALOS: Nothing further, your Honor.

THE COURT: Thank you, ladies and gentlemen. Thank you for your excellent arguments.

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